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Ontario Labour Relations Board
HIGHLIGHTS

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PETER GALLUS RETIREMENT RECEPTION

The Board will hold a reception for Peter Gallus Director/Registrar on the occasion of his Retirement on **October 29, 2014** from 4:00 P.M. – 6:00 P.M

Invitation with details will follow.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in August of this year. These decisions will appear in the July/August issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Employment Standards – Settlement – The employee sought review of an Officer's determination that he was not entitled to termination pay because of his wilful misconduct in keeping money that was allegedly not his – The parties had earlier settled a Small Claims Court action in which the employer had sued the employee for the funds – In the Settlement, the employer's general manager had characterized the dispute as a misunderstanding, effectively reneging on the allegation of wilful misconduct – The Board held that the employer could not now resile from the words of the settlement to assert that the employee had engaged in wilful misconduct – Application allowed; termination pay awarded

CENTRAL AUTO (SUDBURY) LTD. O/A SIMCOE COUNTY CHRYSLER: RE: Devon Mills; RE: Director of Employment Standards; OLRB File No. 2321-12-ES; Dated August 11, 2014; Panel: Maurice A. Green (5 pages)

Colleges Collective Bargaining Act – Practice and Procedure – Ratification and Strike Vote – OPSEU picked a date for a strike authorization vote that was not agreed to by the Council – OPSEU took the position that the words "conducted under the supervision of and in the manner directed by the Ontario Labour Relations Board" did not provide the Board with the jurisdiction to determine the date of the vote, that is, the date of the vote was in the union's sole discretion – The Board first indicated that simply because the statute was more prescriptive with respect to the timing of representation votes ("within a time period determined by the Board") that did not indicate a legislative intention to otherwise exclude from the Board's jurisdiction the determination of something as fundamental as the date of the vote from the clear statutory authority given to the Board to "conduct, supervise and determine the manner" of the strike authorization vote – Second the Board found that reading the words in their "grammatical and ordinary sense" made it impossible to interpret the words at issue as not including the obvious ability to determine the date of the vote – Third, the Board found the union still had the authority and freedom to determine when and if to strike, so it lost no strategic freedom of decision making – The Board determined it had the jurisdiction to determine the timing of the vote – Reasons for earlier direction issued

COLLEGE EMPLOYER COUNCIL; RE: Ontario Public Service Employees Union; OLRB File No. 1143-14-CV; Dated August 26, 2014; Panel: Bernard Fishbein (7 pages)

Certification – Construction Industry – Practice and Procedure – Termination – Unfair Labour Practice – The employer requested that the Labourers produce certain notes and emails which was resisted on the basis of litigation privilege and solicitor client privilege – The context underlying the dispute is a long-standing attempt by the Labourers and Operating Engineers to organize the employer, during which time the employer has voluntarily recognized CLAC – The employer's request arose after the Labourer's first witness testified in chief, when counsel put to the witness that he had made different statements to union organizers than he had just testified to – The employer wanted disclosure of the notes made by the organizer which counsel was referring to – Although the Board found the documents were initially covered by litigation privilege as they met the "dominant purpose" test from *Blank v. Canada*, the Board noted that this was not the end of the matter as this type of privilege was meant to protect a very limited range of interests – As litigation privilege protects a process (as opposed to solicitor client privilege which protects a relationship) the question for each case is how large the "protected area" needs to be to facilitate the adversarial process – On these facts the Board found that the Labourers had relevant and factually significant documents that would likely assist the Board in determining the truth of the matter and that to refuse to order production would work an unfairness on the employer and intervenor – The Board concluded that the protection offered by litigation privilege was no longer necessary for the purpose of protecting the litigation process and to refuse the request would work significant prejudice on the respondents – Matter continues

LOOBY CONSTRUCTION LIMITED; RE: International Union of Operating Engineers, Local 793; RE: Construction Workers Local 53, Affiliated with the Christian labour Association of Canada; OLRB File No. 0010-12-R, 0011-12-R, 0022-12-U, 0027-12-R, 0043-12-U, 0255-12-R, 0471-12-U; Dated August 14, 2014; Panel: David A. McKee (12 pages)

Conflict of Interest – Duty of Fair Representation – When the TTC was reducing the number of Transit Enforcement Officers, it sought ways to avoid lay-offs and committed to finding positions for the laid-off employees – The applicants obtained jobs outside of the bargaining unit (or, in one case, retained a non-bargaining unit position) but later returned to their positions as TEOs – Initially, their full seniority was recognized because of the statutory freeze during negotiations, but subsequently CUPE and the TTC agreed to treat them as new hires upon their return to the bargaining unit – The applicants complained that in forfeiting their seniority the union had breached its duty to represent the applicants fairly – The Board rejected the applicants' argument that their acceptance of positions outside the bargaining unit was a "secondment" and that they retained rights to return to the bargaining unit with rights including full seniority – The Board held that the union owed no obligation to the applicants while they were outside the bargaining unit; the appendix to the collective agreement which gave the applicants and other laid-off TEOs preferential hiring back into the unit was not a guarantee of placement or seniority – It is not improper for a union to make decisions placing the interests of those who remain in a bargaining unit above those individuals who accept (or retain) positions outside of the unit – Moreover, there was no conflict of interest when those negotiating the terms of the collective agreement stood to benefit when others more senior lost their seniority because of the negotiations – There was no suggestion that the union negotiators did anything other than consider the interests of the bargaining unit as a whole – Application dismissed

TORONTO TRANSIT COMMISSION; RE: Courtney Walters, Brian Lia, Jason Barber and Edward Winger; RE: Canadian Union of Public Employees Local 5089; OLRB File No. 2453-13-U; Dated August 11, 2014; Panel: Brian McLean (19 pages)

Certification – Employee – The employer asserted that shift leaders in a retail store should be excluded from the bargaining unit – The Board first found the shift leaders had no real say in the disciplinary decision making process – Second, the Board noted that outside of having the responsibility to enforce compliance with rules and policies and to call in sales associates at the last minute, the shift leaders had little or no discretion to affect the economic lives of the bargaining unit members: they made no decisions about hiring, firing, promoting, wages or formal staff training – Third, although they performed some tasks the associates did not (such as, authorizing time card changes, ordering supplies, counting cash, and opening the store), this did not make them managerial – The vast majority of their time was spent doing exactly what the associates do

and the number of subordinates was quite small – The Board found the shift leaders more analogous to "lead hands" and "working forepersons" who populate much of the Board's jurisprudence, and found them to be bargaining unit members – Certificate issued

YM INC. OPERATING AS SIRENS; RE: United Food and Commercial Workers International Union, Local 175; OLRB File No. 1101-13-R; Dated August 22, 2014; Panel: Patrick Kelly (11 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
College Employer Counsel Divisional Court No.397/14	1143-14-CV	Pending
Dean Warren Divisional Court No.345/14	2336-13-U	Pending
LIUNA- Trisan Divisional Court No.342/14	2620-13-G 2001-13-G et al	Pending
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
Bogdan Koscik Divisional Court No. DC-14-000636-00JR **(Newmarket)**	0956-13-U	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	Pending
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Pending
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Jan 19/15
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	October 28, 2014
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)

Bur-Met Contracting Ltd. et al Court of Appeal No. M43680	3893-11-R	Dismissed; Leave to Appeal refused
EllisDon Corporation Court of Appeal No. C58371	0784-05-G	October 8, 2014 Court of Appeal
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above